

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN M. GALLAGHER	:	CIVIL ACTION
	:	
v.	:	
	:	
BOROUGH OF DOWNINGTOWN, LINDA M.	:	
BAUGHER, ANTHONY S. GAMBALE,	:	
WILLIAM MASON, HEATHER BRUNO,	:	
MICHAEL MENNA, SR., JOSEPH MCGRATH,	:	
JACK FRANCELLO, and DENNIS WALTON	:	NO. 98-3885

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J.

April 13, 2000

Presently before this Court are Plaintiff Brian M. Gallagher's ("Plaintiff" or "Gallagher") Motion for Summary Judgment (Docket No. 15), Defendants Borough of Downingtown ("Downingtown"), Linda M. Baugher ("Baugher"), Anthony S. Gambale ("Gambale"), William Mason ("Mason"), Heather Bruno ("Bruno"), Michael Menna, Sr. ("Menna"), Joseph McGrath ("McGrath"), Jack Francello ("Francello"), and Dennis Walton's ("Walton") (collectively, the "Defendants") response thereto (Docket No. 18), Defendants' sur-reply thereto (Docket No. 19), Defendants' Motion for Summary Judgment (Docket No. 16), and Plaintiff's response thereto (Docket No. 20). For the foregoing reasons, Defendants' motion is **GRANTED** and Plaintiff's Motion is **DENIED**.

I. BACKGROUND

Plaintiff's Complaint alleges that Defendants violated his due process rights under the Fourteenth Amendment (Count I), denied him his liberty interest in reputation under Article I, § 1 of the Pennsylvania Constitution (Count II), and defamed him under Pennsylvania law (Count III). Plaintiff's allegations are stated in connection with his termination as Chief Code Enforcement Officer for Downingtown. Besides Downingtown, the Complaint names the following defendants: Baugher, Mayor of Downingtown; Gambale, Director of Administration and Finance of Downingtown; Mason, President of the Downingtown Borough Council; Bruno, Vice President of the Downingtown Borough Council; Menna, member of the Downingtown Borough Council; McGrath, member of the Downingtown Borough Council; Francello, member of the Downingtown Borough Council; and Walton, member of the Downingtown Borough Council.

On March 3, 1993, Downingtown, through Baugher, Gambale and its Borough Council at the time, appointed the Plaintiff as its Chief Code Enforcement Officer. The Plaintiff was so employed until April 17, 1998, when Gambale terminated him. All the Defendants approved the decision to terminate the Plaintiff. Plaintiff was not notified of any specific and relevant charges for which he was being terminated, nor was he given any opportunity to be heard by or before the appointing authority. The Plaintiff requested a hearing to establish cause, or the lack thereof, for

his termination and his reinstatement if no such cause existed.

On May 13, 1999, the Court entered an Order dismissing two of Plaintiff's causes of action, thereby leaving for adjudication only Plaintiff's claim that his due process rights under the Fourteenth Amendment were violated when his employment was terminated without prior notification of any specific and relevant charges for which he was being terminated. Plaintiff's due process cause of action survives only as to Downingtown pursuant to withdrawal of said cause of action against defendants Baugher, Gambale, Mason, Bruno, Menna, McGrath, Francello, and Walton. (See Praeceptum to Withdraw Claims). On November 30, 1999, the Court denied Plaintiff's Motion to Amend. Both the Defendant Downingtown and Plaintiff have pending before the Court motions for summary judgment.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Ultimately, the moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. Id. at 325. Once the movant adequately

supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2509 (1986). A fact is "material" only if it might affect the outcome of the suit under applicable rule of law. Id.

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992). The court's inquiry at the summary judgment stage is the threshold inquiry of determining whether there is need for a trial--that is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a one party must prevail as a matter of law.

Anderson, 477 U.S. at 250-52. If there is sufficient evidence to reasonably expect that a jury could return a verdict in favor of plaintiff, that is enough to thwart imposition of summary judgment. Id. at 248-51.

III. DISCUSSION

A. Plaintiff Gallagher's Arguments for Summary Judgment

The Downingtown Code adopted by reference the standards of the Building Official and Code Administrators ("BOCA") Building Code as its building code.¹ (See Downingtown Code § 109-1). Downingtown's building code provided for the position of "code official," as follows:

104.1 Code Official: The department of building inspection is hereby created and the executive official in charge thereof shall be known as the code official.

BOCA Code § 104.1. The ordinance provides for the appointment and removal of the code official as follows:

104.2 Appointment: The code official shall be appointed by the chief appointing authority of the jurisdiction; and the code official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority.

BOCA Code § 104.2. Plaintiff alleges that he was the "code official" under the BOCA Code and therefore could not be removed from his position without cause and without a hearing. Plaintiff

¹ The BOCA code is a model code which was adopted but not drafted by Downingtown as its building code ordinance. The code was drafted by a nonprofit organization dedicated to professional code administration and enforcement for the protection of public health, safety, and welfare.

argues that his removal, without cause and without a hearing, deprived him of a legitimate claim of entitlement created by the BOCA Code. The gravamen of Plaintiff's argument is that Downingtown, a borough under Pennsylvania law, granted Plaintiff as the "code official," a property interest in his employment when it adopted the BOCA Code as its building code ordinance. Plaintiff presumes that Downingtown had the authority to contravene Pennsylvania's clear policy that public employees enjoy at-will employment status.

B. Defendant Downingtown's Arguments for Summary Judgment

Defendant argues that it did not have the authority to grant Plaintiff a property interest in his employment. Defendant further argues that as a borough, it is a creature of the Commonwealth and that the authority of the Commonwealth over it is supreme. Accordingly, Downingtown argues that its power to confer employment tenure must be expressly conferred upon it by the Commonwealth. Downingtown further argues that as such power was not conferred upon it by the Commonwealth, that it could not have given Plaintiff a property interest in his employment. Finally, Defendant argues that other relevant circumstances indicate that Plaintiff was an at-will employee notwithstanding the express language of the BOCA Code.

C. The Parties' Motions for Summary Judgment

Plaintiff's due process claim derives from the Fourteenth Amendment, which is made applicable to Defendant by 42 U.S.C. § 1983.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.... [T]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-77, 92 S. Ct. 2701 (1972). To state a valid claim under the Due Process Clause, a plaintiff must show that he or she has been deprived of a protected interest. See Davidson v. Cannon, 474 U.S. 344, 348, 106 S. Ct. 668 (1986). A property interest subject to protection under the Due Process Clause results from "a legitimate claim of entitlement" created by an independent source such as state law. See Board of Regents, 408 U.S. at 577, 92 S. Ct. at 2709 (1972). If a plaintiff can show a legitimate claim of entitlement, due process mandates that any deprivation of that entitlement be preceded by notice and an opportunity for a hearing. See Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 679 (3d Cir. 1991), cert. denied, 503 U.S. 984, 112 S. Ct. 1668 (1992). Because the Supreme Court has limited the circumstances under which public employment qualifies for constitutional due process protection based upon deprivation of a property interest,

a court must look to state law to determine whether the employee had a property interest in his or her employment. See Cooley v. Pennsylvania Housing Finance Agency, 830 F.2d 469, 471 (3d Cir. 1987).

It is fundamental that municipal corporations are creatures of the state and that the authority of the legislature over their powers is supreme. See Shirk v. Lancaster City, 169 A. 557 (Pa. 1933). Any fair, reasonable doubt as to the existence of a power of a municipality is resolved by the courts against its existence. See Knauer v. Pennsylvania, 332 A.2d 589, 591 (Pa. 1975). Accordingly, Defendant only may exercise the powers expressly granted to it by the legislature. See Appeal of Gagliardi, 163 A.2d 418 (Pa. 1960).

In the employment context, Defendant's rights are proscribed by the Commonwealth's employment at-will doctrine. Commonwealth law is clear that as a general rule, employees are at will, absent a contract, and may be terminated at any time for any reason or no reason at all. See Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974). "Tenure in public employment, in the sense of having a claim to employment which precludes dismissal on a summary basis, is, where it exists, a matter of legislative grace." Scott v. Philadelphia Parking Auth., 166 A.2d 278, 281 (Pa. 1961). As a general rule, municipalities are not permitted to enter into

employment contracts absent authorizing legislation. See Stumpp v. Stroudsburg Municipal Auth., 658 A.2d 291 (Pa. 1995).

The Commonwealth has not passed legislation which authorizes Boroughs to abrogate the employment at-will doctrine.² State legislative enactments evidence no intent, express or implicit, to allow boroughs to grant their employees a property interest in their employment. See Skrocki v. Caltibiano, 568 F. Supp. 703, 705 (E.D. Pa. 1983).

Commonwealth law requires municipal entities to appoint a zoning officer to administer the jurisdiction's zoning ordinance. See 53 Pa. Cons. Stat. Ann. § 10614. The statute states as follows:

Appointment and powers of zoning officer. For the administration of a zoning ordinance, a zoning officer, who shall not hold any elective office in the municipality, shall be appointed. The zoning officer shall meet qualifications established by the municipality and shall be able to demonstrate to the satisfaction of the municipality a working knowledge of municipal zoning. The zoning officer shall administer the zoning ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance. Zoning officers may be authorized to institute civil enforcement proceedings as a means of enforcement when acting within the scope of their employment.

53 Pa. Cons. Stat. Ann. § 10614. As Downingtown is a "borough" under Commonwealth law, the zoning officer must be appointed by the Downingtown borough council. The Commonwealth legislature

²

To date, the Commonwealth has not adopted the BOCA Code.

expressly delineated the power and authority possessed by a borough council:

The council of the borough shall have power [t]o create, by motion, ordinance or resolution, and appoint a treasurer, a secretary, a solicitor, an engineer, a street commissioner and such other officers as it deems necessary. The treasurer and the secretary shall not be members of council. A bank or bank and trust company may be appointed as treasurer. All officers and employees appointed by the council, with the exception of those who under the provisions of this, or any other act are under civil service or have a definite term of office, shall serve for an indefinite term at the pleasure of the council.

53 Pa. Cons. Stat. Ann. § 46005(1). Downingtown's borough council is also invested with the following general powers:

General Powers. To make and adopt all such ordinances, bylaws, rules, and regulations not inconsistent with or restrained by the Constitution and laws of the Commonwealth, as may be expedient or necessary for the proper management, care and control of the borough and its finances, and the maintenance of peace, good government, safety and welfare of the borough, its trade, commerce and manufactures.

53 Pa. Cons. Stat. Ann. § 46202(74).

In light of the above, the dispositive issue is whether Defendant had the authority to provide Plaintiff with a property right in his employment or, in the alternative, whether Plaintiff has a legitimate claim of entitlement created by Commonwealth law or a similarly independent source. It is undisputed that Plaintiff was a public employee, employed by Defendant. Plaintiff acknowledges that Pennsylvania municipal employees cannot generally establish a protected property interest in their employment. (See Pl.'s Answ. to Def.'s Mot. for Summ. J. at 3). Plaintiff also acknowledges that he did not have a written employment contract,

that he was not subject to a collective bargaining agreement, that he was not considered to be a civil servant, and that he did not have a writing which defined or in any way set forth the duration of his employment. (See Gallagher Dep. Tr. at 21-25). Plaintiff also acknowledges that in 1993 and in 1997 he received an employee handbook from Defendant and that each handbook expressly stated that it was not an employment contract and did not guarantee employment for any specific duration. (See Gallagher Dep. Tr. at 29-36). Plaintiff additionally acknowledges that he was never told that the at-will language of his employee handbook was inapplicable to him. (See Gallagher Dep. Tr. at 36). Plaintiff's argument that he had a property interest in his employment is therefore solely premised upon his interpretation of section 104-2 of the BOCA Code.\³

Plaintiff's due process argument is that the Downingtown Code guarantees him employment. Indeed, "for-cause" termination provisions have been recognized as establishing a protectable property interest in employment. See Linan-Faye Const. Co. v. Housing Auth. of Camden, 49 F.3d 915, 932 (3d Cir. 1995); Samson v. Harvey's Lake Borough, 881 F. Supp. 138, 142 (E.D. Pa. 1995).

³ The relevant text of the provision states that the "code official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority." BOCA Code § 104.2. It must be noted that section 109-2 of the Downingtown Code sets forth the Borough's amendments to the BOCA Code. Conspicuously absent from said amendments is either the deletion or alteration of the BOCA Code language which provides that the code official shall be removed only for cause and be provided an opportunity to be heard.

Nevertheless, Plaintiff's belief or expectation that the Downingtown Code provides to him a property interest in his employment does not equate to an "entitlement" under Commonwealth law. See Wentling v. Honey Brook Twnshp., No. CIV.A. 96-8569, 1998 WL 103184, at *4 (E.D. Pa. Feb. 27, 1998) (responding to Plaintiff's argument that BOCA Code created a property interest in employment for "code official, court stated that "[e]stablishing a property interest requires something more than a showing of expectation or desire.").

The Commonwealth Borough Code authorizes Defendant to adopt, inter alia, ordinances, the Borough's power is expressly restricted to adopting ordinances "not inconsistent with or restrained by the Constitution and laws of the Commonwealth." 53 Pa. Cons. Stat. Ann. § 46202(74) (emphasis added). A municipal entity such as Defendant may alter the at-will status of a municipal employer-employee relationship only when its right to do so is "expressly" set forth in enabling legislation. See Scott, 166 A.2d at 157. Defendant has no authority to "whimsically 'contract away' the 'sound principles of public policy . . . fundamental to a scheme of good government.'" Skrocki v. Caltibiano, 568 F. Supp. 703, 705 (E.D. Pa. 1983) (quoting Scott, 166 A.2d at 157). Accordingly, Defendant's borough council's authority to adopt ordinances and hire officers is proscribed by the by the express language of the Borough Code.

Under the Borough Code, all officers and employees appointed by Defendant's borough council, "with the exception of those who under the provisions [of the Borough Code], or any other act are under civil service or have a definite term of office, shall serve for an indefinite term at the pleasure of the council." 53 Pa. Cons. Stat. Ann. § 46005(1). Plaintiff was not a civil servant. He did not have a definitive term of office. He was never lawfully granted a property interest in his employment by the Borough's adoption of the BOCA Code or any act of the Commonwealth legislature. Accordingly, he was an employee at-will serving for an indefinite term at the pleasure of the council.

In the absence of the authority to do otherwise, Defendant was empowered by the Commonwealth legislature to establish with Plaintiff an at-will employment relationship. There is no authority under Commonwealth law that suggests that Defendant could have acted otherwise with regard to Plaintiff's employment. The BOCA Code provision on which Plaintiff relies is simply surplusage wherein Defendant overstepped the legal authority invested in it by the Commonwealth legislature. Therefore, as Plaintiff was an at-will employee, he possessed no proprietary interest in his employment. In the absence of a proprietary interest, Plaintiff's due process claim must fail. As such, no issues remain for

adjudication. Plaintiff's Motion for Summary Judgment is denied and Defendant's Motion for Summary Judgment is granted.

The Court's Final Judgment follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN M. GALLAGHER	:	CIVIL ACTION
	:	
v.	:	
	:	
BOROUGH OF DOWNINGTOWN, LINDA M.	:	
BAUGHER, ANTHONY S. GAMBALE,	:	
WILLIAM MASON, HEATHER BRUNO,	:	
MICHAEL MENNA, SR., JOSEPH MCGRATH,	:	
JACK FRANCELLO, and DENNIS WALTON	:	NO. 98-3885

FINAL JUDGMENT

AND NOW, this 13th day of April, 2000, Plaintiff Brian M. Gallagher's Motion for Summary Judgment (Docket No. 15), Defendants Borough of Downingtown ("Downingtown"), Linda M. Baugher, Anthony S. Gambale, William Mason, Heather Bruno, Michael Menna, Sr., Joseph McGrath, Jack Francello, and Dennis Walton's (collectively, the "Defendants") response thereto (Docket No. 18), Defendants' sur-reply thereto (Docket No. 19), Defendants' Motion for Summary Judgment (Docket No. 16), and Plaintiff's response thereto (Docket No. 20), IT IS HEREBY ORDERED that:

- (1) Defendants' Motion for Summary Judgment is **GRANTED**; and
- (2) Plaintiff's Motion for Summary Judgment is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.